IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.M.JOSEPH

TUESDAY, THE 21ST AUGUST 2007 / 30TH SRAVANA 1929

WP(C).No. 24746 of 2007(U)

PETITIONER:

AYILLATH SREEDHARAN NAMBIAR,
SENIOR ADVOCATE, 69, NEETHI BAGH,
NEW DELHI.

BY ADV. SRI.GEORGE K. GEORGE
BY SENIOR COUNSEL SRI. P.K. RAVINDRANATHA MENON.

RESPONDENTS:

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1. STATE OF KERALA REPRESENTED BY
CHIEF SECRETARY, THIRUVANANTHAPURAM.

2. SECRETARY, LOCAL SELF GOVERNMENT
DEPARTMENT, THIRUVANANTHAPURAM.

3. SECRETARY, EDAKKAD PANCHAYATH,
P.O.THOTTADA (VIA) CHOVVA, KANNUR DISTRICT.

BY SR. GOVT. PLEADER SRI. K.J. MOHAMMED ANZAR.

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 21/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.M.JOSEPH, J.

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WP.(C) No.24746 of 2007

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Dated this the 21st day of August, 2007

JUDGMENT

The interesting question that is raised by the petitioner in this case is essentially whether Article 243 G of the Constitution contains the source of legislative power for the State to enact a law relating to buildings in the Panchayats.

2. Case of the petitioner in brief is as follows:

He is a Senior Advocate practicing in the Supreme Court and he desires to retire and settle down in his home village in Kerala. The work of construction of a farm house was entrusted to a Contractor. It is while so that he came to know of the notification issued in the Gazette on 6.6.2007 extending certain chapters of the Municipalities Act and the Building Rules to all Panchayats and therefore the construction of the compound wall is not permitted without the permission of the Panchayat. He was asked to apply for permission to continue with the construction of the compound wall and the application he made is pending. Petitioner challenges Section 274 of

the Panchayat Raj Act. He further seeks a declaration that Ext.P1, which is the Government Order dated 6.6.2007 is ultra vires, without jurisdiction, unauthorised and beyond the competence of the delegated authority and delegated legislation.

3. I heard learned Senior Counsel Sri. P.K. Ravindranatha Menon appearing on behalf of the petitioner and also the learned Government Pleader.

4. The case sought to be built up by the petitioner is this. The 73rd amendment to the Constitution of India was enacted bringing about a sea change as it incorporated Articles 243 A to 243 O. This is accompanied by the inclusion of Eleventh Schedule to the Constitution. The aforesaid provisions related to the Panchayats. On the other hand by the 74th amendment Articles 243P to 243 Z and 243 ZA to 243 ZG along with the Twelfth Schedule were incorporated. They related to the Municipalities. Petitioner relies on the wording of Article 243G and contrasts the same with Article 243 W. They are extracted hereunder.

"**243-G. Powers, authority and responsibilities of**

Panchayats.- Subject to the provisions of the Constitution, the Legislature of a State may, by law, endow the Panchayats with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Panchayats at the appropriate level, subject to such conditions as may be specified therein, with respect to -

(a)the preparation of plans for economic development and social justice;

(b) the implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to the matters listed in the Eleventh Schedule.

243-W. Powers, authority and responsibilities of Municipalities, etc.- Subject to the provisions of this Constitution, the Legislature of a State may, by law, endow-

(a) the Municipalities with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Municipalities, subject to such conditions as may be specified therein, with respect to-

(i) the preparation of plans for economic development and social justice;

(ii) the performance of functions and the implemantation of schemes as may be entrusted to them including those in relation to the matters listed in the Twelfth Schedule;"

He would bring my attention to the Twelfth Schedule to the Constitution and Entry 2 therein, which reads as follows:

"2. Regulation of land use and construction of buildings."

It is his case that there is no such entry in the Eleventh Schedule . The conspicuous absence of the entry available in the Twelfth Schedule in the Eleventh Schedule, according to Senior Counsel has the effect of denying the State legislature the legislative competence to make a substantive law relating to regulation of buildings in relation to a Panchayat. He would further contend that when there is no legislative power to enact a substantive law by itself in relation to regulation of buildings in respect of a Panchayat, it is clear that what it cannot do directly, it cannot do indirectly. Section 274 of the Panchayat Raj Act

reads as follows:

> "**274. Extension of provisions of the Municipal laws or of the rules thereunder**.- (1) The Government may, whether at the request of the Panchayat or otherwise, by notification in the Gazette, declare that any of the provisions of the law relating to Municipalities in the State in force for the time being or of any rules made thereunder, shall be extended to, and be in force, in a Panchayat area or any specified place therein.
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> (2) The provisions so notified shall be construed with such alterations not affecting the substance as may be necessary or proper for the purpose of adapting them to the Panchayat area or any specified place therein."

He would expatiate and contend that whatever may have been the position prior to the 73rd amendment the State legislature has no legislative power to enact a law except in respect of matters contained in the Eleventh Schedule. Construction of Buildings not being an entry in the Eleventh Schedule, there was no legislative competence in respect of a Panchayat. By enacting Section 274, power is sought to be arrogated to apply the law in a Municipal area relating to buildings in a Panchayat, which is plainly impermissible, it is contended. He would

contend that when the Constitution is amended to include Article 243W read with Twelfth schedule empowering the State legislature to enact a law regulating the construction of buildings etc., in a Municipal area and regulation of buildings is not included in the Eleventh Schedule, the legislature does not have competence to legislate regarding regulating construction of buildings in a Panchayat. He also relies on Article 243N. It reads as follows:

> "**243-N. Continuance of existing laws and Panchayats.-** Notwithstanding anything in this Part, any provision of any law relating to Panchayats in force in a State immediately before the commencement of the Constitution (Seventy-second Amendment) Act, 1992, which inconsistent with the provisions of this Part, shall continue to be in force until amended or repealed by a competent Legislature or other competent authority or until the expiration of one year from such commencement, whichever is earlier:
>
> Provided that all the Panchayats existing immediately before such commencement shall continue till the expiration of their duration, unless sooner dissolved by a resolution passed to that effect by the Legislative Assembly

> of that State or, in the case of a State having a Legislative Council, by each House of the Legislature of that State."

Senior Counsel would submit that fresh legislation in respect of Building Rules may be permissible. At any rate he would submit that the present statute incorporated on the basis of the 73rd amendment cannot vest power with the State legislature. Learned counsel also relied on the preamble to the Panchayat Raj Act. The Preamble reads as follows:

> "Preamble.- Whereas it is expedient to replace the present enactments relating to Panchayats and district councils by a comprehensive enactment to establish a three-tier Panchayat Raj System in the State in line with the Constitution (Seventy-third Amendment) Act, 1992, for securing a greater measure of participation of the people in planned development and in local governmental affairs, by constituting village, block and district Panchayats;
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> And endow such Panchayats with such powers and authority to enable them to function as institutions of self-government;
>
> And entrusting such Panchayats the preparation of

plans and implementation of schemes for economic development and social justice including the implementation of schemes in relation to the matters listed in the Eleventh Schedule to the Constitution;

Be it enacted in the Forty-fifth Year of the Republic of India as follows:-"

5. In order to appreciate the contentions of the petitioner, it is necessary to remind oneself of the power of judicial review in respect of legislation. Judicial review of legislation is premised essentially on the existence of three well known grounds. They are as follows: a) A law which falls foul of any of the fundamental rights in Chapter III of the Constitution must perish to the extent of the contravention, b)Lack of legislative competence for the author of the legislation having regard to the scheme of demarcation of legislative powers contained in Articles 245 to 255 read with list 1, 2 and 3 of the Seventh Schedule and c) the law is not in conformity with any other constitutional injunction. An example of a possible constitutional provision falling in the third category would be Article 301 of the Constitution. Article 246(3) of the Constitution reads as follows:

> "246(3). Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (In this Constitution referred to as the "State List")"

Entry 5 of list 2 reads as follows:

> "Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration."

It is well settled that the entries in the various lists are fields of legislation and the courts have recognised a very large measure of freedom for the legislature to legislate on the matters included in the list provided in pith and substance the legislation is traced to the four corners of a particular entry. The authority is given under Section 274 of the Panchayat Raj Act to apply building regulations relating to Municipalities in the State or any Rules to any Panchayat area or any specified place therein. I am only to pronounce on the contention

essentially flowing from the provisions contained in Article 243G and Article 243W and the difference in the entries in the Eleventh and Twelfth Schedules, which pertain respectively to the aforesaid Articles. I am of the firm view that the source of legislative power of the State legislature is contained in Entry 5 of list II to the Seventh schedule of the Constitution read with Sub Article 3 of Article 246 of the Constitution. Lack of legislative competence on the one hand is one ground to attack legislation. Lack of conformity with any constitutional mandate is another. The difference in consequence of the breach of the said principles are well known.

6. The 73rd Constitutional amendment essentially had the broad purpose of conferring greater powers on the local bodies. The central theme of the amendment was the attainment of greater decentralisation. To that extent there was a need for overhauling of the existing legislation. Limitations on the exercise of legislative power are certainly provided. An apt example would be Article 243 D. It provides for reservation of seats for Scheduled Castes and Scheduled Tribes in every Panchayat. The period of the Panchayat is fixed in

Article 243E. It also provides for various disqualifications for being a member. Article 243H enables the legislature to collect taxes, duties, tolls, fees etc. This may be a conferment of power. Of course it was principally contemplated to have a three tier system of Panchayat Raj. In my view Article 243G provides for the legislature to confer on the Panchayats with powers and authority as are necessary to enable them to function as institutions of self Government. Thereafter it proceeds to provide that any such law may contain provisions for devolution of powers and responsibilities. Even proceeding on the basis that Article 243G contains the source of legislative power, it is to be noted that Clause (b) essentially provides for the matters about which the laws could be made. The words used are 'including those' in the Eleventh Schedule. That itself clearly shows that proceeding on the basis that 243G provides the source of legislative power the matters provided in the Eleventh Schedule are not exhaustive. The fact that an entry similar to entry 2 in the Twelfth Schedule is conspicuous by its absence in the Eleventh schedule in my view makes no difference to the exercise of the legislative power which is otherwise legitimately

available to the State legislature under the respective entry included in list II of the Seventh Schedule. In fact it is to be noted that in the Panchayat Raj Act itself there is a whole Chapter relating to buildings. It is contained in Chapter XXI. In fact it is to be noted that even Article 243G itself provides for conferment of powers by a law made by the State Legislature on the Panchayats for enabling them to function as institution of self Government. It is difficult to conceive of a modern day institution of self Government which is not provided with power to regulate construction of buildings. At any rate in my view it cannot be said that the power relating to regulation of buildings is not to be a power which is not available to an effective institution of a self Government. I also note that in Entry 11 item No.2 refers to land development. In other words I would think that Articles 243 G and 243 W cannot construe as being the field of a legislation. At any rate it is difficult not to consider a law relating to building regulation as not being embraced within the scope of powers necessary to enable a Panchayat to function as an institution of self Government, in which case the power is certainly available even with reference to Article

243G. Section 274 cannot be thought of as a law which contravenes Article 243G. There is a presumption that the legislature knows the needs of its people. There is a presumption of validity of a legislation. The argument of the petitioner being only built around Article 243G and Article 243W read with Eleventh and Twelfth Schedules, once this court comes to the conclusion that there is legislative power to enact laws in relation to regulation of buildings within the area falling in the province of the Panchayat, it is not difficult to sustain Section 274 of the Panchayat Raj Act. Once Section 274 of the Act is sustained, then the exercise of power thereunder by issuing Ext.P1 applying the Building Rules of the Panchayat may not be open to criticism as the argument is that there is no substantive power to make the law as contained in the Panchayat Raj Act, 1994.

7. The argument based on the wording of the preamble does not appeal to me. A preamble, as is well settled, may be a key to open the mind of the legislature in case of ambiguity in the provisions of the Act. It is undoubtedly a part of the Act. It may play a role in judicial interpretation of a statute in appropriate cases of an ambiguity by

throwing light on the intent of the legislation. Beyond that the preamble does not have a role. The argument of validity of an act cannot be premised on the wording of the preamble. In fact the preamble in this Act only refers to the need for replacing the existing enactments relating to Panchayats and District Councils by a comprehensive enactment to establish a three tier Panchayat Raj system in the State in line with the Constitution (Seventy third Amendment) Act, 1992 for securing a greater power and authority and entrusting plans and implementation of schemes for economic development. I do not see how the same can advance the case of the petitioner which he has set up before me. I would therefore think that there is no merit in the challenge either to Section 274 of the Panchayat Raj Act or to the notification issued therein.

The writ petition fails and it is dismissed.

(K.M. JOSEPH, JUDGE)

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